No. 83-1113

In the Supreme Court of the United States

October Term, 1983

WALTER WILSON,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Whether, absent a clear violation of a substantial duty of counsel and actual prejudice resulting therefrom, the petitioner has received effective assistance of counsel.

2(A). Whether the Constitution permits states to place the burden of proving the affirmative defense of self-defense upon the accused.

2(B). Whether a trial court's charge to the jury instructing that voluntary manslaughter is a lesser included offense of murder and that the accused should be convicted of voluntary manslaughter if the evidence shows the accused knowingly caused the death of another while under extreme emotional stress is a proper charge under Ohio law and within the parameters of constitutional due process.

3. Whether the trial court properly denied the accused's post-trial motion for judgment of acquittal when a reasonable jury can reach different conclusions from the evidence as to whether each material element of a crime has been proven beyond a reasonable doubt.

4. Whether the trial court correctly denied a new trial and an evidentiary hearing based upon unsupported allegations of ineffectiveness of counsel.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right

for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Defendant-petitioner, Walter Wilson, was indicted by a Cuyahoga County Grand Jury for the aggravated murder of Quinton Lumpkin, a violation of Ohio Revised Code, Section 2903.01. The indictment was amended to charge murder, a violation of Ohio Revised Code, Section 2903.02. After a trial by jury, petitioner was found guilty of murder and sentenced to fifteen years to life in prison.

On June 23, 1983, the Eighth District Court of Appeals affirmed petitioner's conviction and sentence. Petitioner Wilson filed a Memorandum seeking jurisdiction in the Supreme Court of Ohio. The State Supreme Court denied jurisdiction on October 12, 1983. The present petition for writ of certiorari to the Eighth District Court of Appeals followed.

STATEMENT OF FACTS

The evidence adduced at trial is as follows:[1]

Petitioner Walter Wilson operated a grocery store located across the street from a cleaners operated by the

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1. References to the transcript of the proceedings will be designated by the prefix "R".

victim, Quinton Lumpkin (R. 25). For several months prior to the murder, Wilson had been attempting to buy the building in which the victim's business was located (R. 33). He had arranged to purchase the building on condition that the victim and his business be evicted (R. 267). On May 29, 1981, the petitioner sent one of his young employees over to tape an eviction notice on the victim's front door. Moments later, the victim entered the petitioner's store to find out who left the notice and what it was about (R. 192-193). The petitioner was in the office of his store when he saw the victim enter (R. 247). The petitioner then picked up a .38 caliber revolver, concealed it behind his back, and went out to talk to the victim (R. 248). Lumpkin had the envelope in his hand and was angrily questioning Wilson about it. Wilson told Lumpkin that he could not talk to him about it during business hours. Lumpkin became very angry and continued arguing and swearing loudly. Wilson denied knowing anything about the eviction notice (R. 193-194).

Although all of the eyewitnesses were friends or employees of the petitioner, there was considerable disagreement as to what, if anything, the victim did. Some witnesses, including the petitioner, testified that Lumpkin reached for his gun when Wilson pulled out his pistol; other testimony indicated that only the petitioner went for his gun (R. 229). Nevertheless, Wilson reached behind his back, pulled out his revolver, and began firing. He fired four shots from his revolver taking a few seconds between each shot to re-aim (R. 51). Wilson hit the victim with three of his four shots. One shot went through the victim's upper left arm, shattering the bone. Another slammed into the victim's right pelvis, knocking him to the floor face down and the third shot was fired into the victim's left buttock as he laid on the floor with

his feet toward the petitioner (R. 152-153, 159). A fourth shot fired by the petitioner missed the victim and wounded a bystander in the petitioner's store (R. 230). The petitioner then set the revolver on the counter and retrieved his .12 gauge shotgun (R. 53). In those moments, the victim had been able to retreat behind a wooden shelf and was struggling to his feet (R. 207). Wilson said nothing but picked up his shotgun and fired it at the victim's face. The shotgun blast ripped through the wooden shelves that the victim was hiding behind and into the victim's face and throat (R. 151-153, State's Exhibits 7-28). This was the only fatal shot fired (R. 40-47).

When the police arrived, they found the victim's automatic handgun on the floor. Although the pistol had bullets in the clip (handle), there was no bullet in the firing chamber.

When questioned by the police, petitioner claimed he had killed Lumpkin because "he had that gun" (R. 87), although he never stated that the victim had drawn the weapon or even threatened the petitioner. At trial, the petitioner denied ever having aimed at the man whom he had shot four times (R. 256).

After hearing the testimony of the coroner, the police, the eyewitnesses and the petitioner, and after viewing the physical evidence, the jury found the petitioner guilty of murder. This conviction was appealed to the Court of Appeals, Eighth District, Cuyahoga County, which affirmed the judgment of the trial court on June 23, 1983.

REASONS FOR DENYING THE WRIT

1. Absent a clear violation of a substantial duty of counsel and actual prejudice resulting therefrom, the petitioner was not denied the effective assistance of counsel.

Petitioner, in rather opaque language, seems to argue that he was denied effective assistance of counsel because his trial counsel failed to request a jury instruction to the effect that petitioner had no duty to retreat. Petitioner also seems to argue that his trial attorney should have objected to certain remarks by the prosecutor during final argument. Petitioner's claim of ineffective assistance of counsel are unsupported and unsupportable. Petitioner's first argument is meritless and does not warrant Supreme Court review.

Since the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932), there has been an expansion of the scope of the Sixth Amendment right to counsel. However, this expanding scope has not been accompanied by a clear articulation of what level of effectiveness is guaranteed by the Constitution. Various formulations have been pronounced by the Courts: Counsel should exercise customary skill and knowledge which normally prevails at the time, *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir., 1970); a minimum standard of professional representation, *United States v. Twomey*, 510 F.2d 634, 641 (7th Cir., 1975); reasonably effective assistance of counsel, *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir., 1974). The United States Court of Appeals of the District of Columbia, in *United States v. Decoster*, 624 F.2d 196 (1976), *cert. den.*, 100 S. Ct. 302 (1979), announced a standard by which to gauge effective assistance of coun-

sel: that the claimed inadequacy was a serious incompetency falling measurably below the performance ordinarily expected of fallible lawyers. *Id.* at 206.

The test in Ohio as to whether an individual has been denied effective counsel was initially set forth in *State v. Hester*, 45 Ohio St. 2d 71, 79 (1976). The Ohio Supreme Court formulated the following test:

> Balancing the rights of the accused and the public, we hold the test to be whether the accused, under all the circumstances . . . had a fair trial and substantial justice was done.

The Ohio Supreme Court further defined the standard in *State v. Lytle*, 48 Ohio St. 2d 391 (1976). The Court promulgated a two-step process that should be employed by courts considering allegations of ineffective assistance of counsel:

> First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.

Lytle, at 396.

In Ohio, a properly licensed attorney is presumed to be competent. *Vaughn v. Maxwell*, 2 Ohio St. 2d 299 (1965). Thus, the burden of proof of ineffective assistance of counsel is on the accused. This burden is a heavy one. *State v. Smith* (Cuy. Cty. Ct. App., December 17, 1981), No. 43499. It is well settled that, to meet this burden, an accused must show (1) that counsel has substantially *violated an essential duty* to the accused and (2) that the

accused was thereby prejudiced. *State v. Lytle, supra; State v. Hester, supra.* Petitioner has completely failed to satisfy either of these criteria.

Even assuming some factual or legal basis for petitioner's arguments, it is clear, first of all, that the court's charge dealt with petitioner's right to use deadly force (this, despite the lack of evidence that the victim had done so and the ample evidence petitioner used excessive force). The fact is that the Court charged the jury:

> If a person is assaulted by another, who apparently intended to kill or cause great bodily harm, the person assaulted is not required to retreat, but may repel force with force and kill his assailant, if it reasonably appears to the defendant, necessary to do so. (R. 347.)

There was no need and no duty upon trial counsel to request an instruction that Wilson had no duty to retreat. Even if there were a duty, failure to request the instruction caused no prejudice to petitioner since the court gave a substantially similar instruction anyway.

Petitioner's point of lawyer ineffectiveness during the State's closing argument also fails to show any violation of a substantial duty or any resulting prejudice. As the Court of Appeals noted in affirming this conviction, the prosecutor prefaced his closing remarks with a statement that they were not law (although they were legally correct).[2]

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2. In *State v. Melchior*, 56 Ohio St. 2d 15 (1978), the Ohio Supreme Court held that to meet a claim of self-defense, the defendant must show he was not at fault in creating the situation giving rise to the affray, that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from the danger was the use of deadly force, and that the defendant did not violate any duty to retreat. *Accord, State v. Robbins*, 58 Ohio St. 2d 74 (1979).

Moreover, the court's subsequent charge corrected any possible error. The trial court instructed the jury that the law given by the court must be followed and that Wilson had no duty to retreat. Thus, even assuming a substantial violation of duty, there was clearly no prejudice to the petitioner. See *State of Ohio v. Walter Wilson* (Cuy. Cty. Ct. App., June 23, 1983), Unreported Case No. 45650, at 4. Walter Wilson has failed to demonstrate ineffective trial counsel throughout his appellate process. His first assertion does not merit review by this Supreme Court and should be dismissed.

Finally, petitioner relies on a misinterpretation of *Engle v. Isaac,* 71 L. Ed. 2d 783 (1982), which deals with Ohio self-defense statute as it existed from 1974 to 1977—prior to appellant's trial. Currently, in Ohio, the crime of Murder is defined by Ohio Revised Code, Section 2903.03 which clearly *does not* include the absence of self-defense as one of its elements. When an accused, therefore, asserts an affirmative defense as a justification for an otherwise unlawful act, the burden of proof can be constitutionally shifted to the accused. *State v. Davis,* 8 Ohio App. 3d 205. This issue is raised in petitioner's second proposition; the state's response is discussed in more detail there.

2(A). The Constitution permits states to place the burden of proving the affirmative defense of self-defense upon the accused.

Petitioner raises essentially the same issues in his assertions II(A) and (D); therefore, both will be addressed together.

Before addressing petitioner's second claim, the state would like to point out that this assignment of error attacking the placement of the burden of proof for self-

defense has been brought before this Supreme Court by this defense counsel on a previous occasion, and the Petition for Writ of Certiorari was denied. *State v. Washington* (Cuy. Cty. Ct. App., October 15, 1981), Unreported Case No. 43219, *cert. den. sub. nom., Washington v. Ohio,* ..... U.S. ....., 73 L. Ed. 2d 1319 (1982). The Petition for Writ of Certiorari in Walter Wilson's case should likewise be denied.

The petitioner's due process rights were not violated by requiring him to prove by a preponderance of the evidence that he acted in self-defense. In Ohio, self-defense is an affirmative defense. *State v. Poole,* 33 Ohio St. 2d 18 (1973). The Ohio legislature has placed the burden of proving self-defense upon the accused in Ohio Revised Code, Section 2901.05:

> § 2901.05 Burden and degree of proof.
>
> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.
>
> * * * * *
>
> (C) As used in this section, an "affirmative defense" is either of the following:
>
> (1) A defense expressly designated as affirmative;
>
> (2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

Thus, the State legislature has mandated that the burden of justifying a murder with a claim of self-defense be on the defendant.

The Ohio Supreme Court has held that it is not unconstitutional to require a defendant to prove an affirmative defense by a preponderance of the evidence. *State v. Frost*, 57 Ohio St. 2d 121, 126-127 (1979). Further, it has been held that Ohio Revised Code, Section 2901.05(A) does not unconstitutionally shift the burden of proof to a defendant if the defense does not negate an essential element of the crime charged. *State v. Davis*, 8 Ohio App. 3d 205 (1982). In *Davis*, defense counsel (the same person acting as defense counsel in the instant petition) alleged the same constitutional violation, i.e., that the State should have the burden of proving that an accused did not act in self-defense. In overruling Davis's assertion and affirming his conviction, the Appeals court stated:

> This court has repeated- [209] ly held that Ohio's criminal code constitutionally assigns that burden of proof to the defense. Those decisions have never suggested that a defendant asserting self-defense has the burden of proving himself innocent. Rather, self-defense is an affirmative defense which justifies otherwise unlawful conduct; the absence of that justification is not an element of crimes set forth in R. C. Chapter 2903. Cf. *State v. Frost* (1979), 57 Ohio St. 2d 121 [11 O.O. 3d 294]..
>
> In *Engle v. Isaac* (1982), 71 L. Ed. 2d 783, the United States Supreme Court stated, at page 797, that the argument against this assignment of the burden of proof asserts "a colorable constitutional claim." However, the court's opinion concluded at page 795:

> "A careful review of our prior decisions reveals that this claim is without merit. Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime. Compare *Mullaney v. Wilbur* [(1975), 421 U. S. 684], *supra*, with *Patterson v. New York* [(1977), 432 U. S. 197], *supra*." (footnote omitted.)

Davis, at 208, 209. The *Davis* court's ruling is based on a logical interpretation of *Isaac*, *Mullaney* and *Patterson* and is consistent with many cases which have previously addressed the self-defense issue.[3] Placing the burden of proving self-defense upon the person claiming self-defense does not violate constitutional due process. Petitioner's second claim lacks constitutional merit.

Petitioner's claim seems to be based upon an erroneous reading of *Patterson* and *Isaac*. Petitioner tries to distinguish *Patterson* as "dealing with defenses of mitigation" and not with *complete* defenses (Petitioner's petition, at 21-22). While this Court held that the prosecution must prove every element of a charged offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), it did not require the State to:

> prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an *exculpatory* or mitigating circumstance affecting the degree of culpability or severity of the

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3. *See also, State v. Jones* (Ct. App. Cuy. Cty., March 17, 1983), Unreported Case No. 45236; *State v. Washington* (Ct. App. Cuy. Cty., October 15, 1981), Unreported Case No. 43219, *cert. den. sub nom., Washington v. Ohio*, ... U.S. ....., 73 L. Ed. 2d 1319 (1982); *State v. Johnson* (Ct. App. Cuy. Cty., July 16, 1981), Unreported Case No. 42846; *State v. Britten* (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 40644.

punishment. *Patterson, supra,* at 207. (Emphasis added.)

The Court specifically distinguished affirmative defenses (which do not negate the elements of a crime but rather raise a separate exculpatory issue) from the elements themselves (which constitutionally must be proved by the State):

> Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required;* and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. *Patterson,* at 210. (Emphasis added.)

Patterson does apply to cases such as the present, in which complete (as well as mitigating) defenses are raised, and does *not* require that the state prove the non-existence of self-defense. The trial court committed no error in instructing the jury that the defendant, Walter Wilson, must prove by a preponderance of the evidence that he acted in self-defense.

This Supreme Court has in fact held that the burden of proving an affirmative defense may be placed on the person asserting the defense. In *Leland v. Oregon,* 343 U.S. 790 (1952), this Court upheld an Oregon statute requiring the defendant to prove the defense of insanity be-

yond a reasonable doubt. The standard of proof for self-defense in the instant case, by a preponderance of the evidence, is by far a less cumbersome burden on an accused than was the burden of proof for insanity approved in *Leland*.

Additionally, the Sixth Circuit Court of Appeals, following *Patterson*, held that a defendant may constitutionally be required to prove an affirmative defense. *Krzeminski v. Perini*, 614 F.2d 121 (6th Cir., 1980), *cert. den.*, 449 U.S. 866 (1980). In *Krzeminski*, the defendant attacked the validity of having to prove his defense of insanity. In affirming the conviction, the Sixth Circuit directly applied the *Patterson* holding:

> Patterson makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. *The State may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional* disturbance or insanity upon the defendant.

Krzeminski, at 123. (Emphasis added.)

In the present case, the jury was correctly instructed that the State had the burden of proving every element of the crime beyond a reasonable doubt. Under *Patterson*, *Krzeminski* and *Davis*, therefore, this jury charge was correct. The charge placing the burden of proving self-defense was also correct. Petitioner's conviction should be sustained.

In the case at bar, petitioner was charged with murder. The elements of murder are purposely causing the death of another. By asserting self-defense, one admits a purposeful killing but seeks to justify the act. The defense therefore does not negate any elements of the crime.

Therefore, it is constitutionally permissible to require an accused to bear the burden of proof by a preponderance. It was not error to so instruct the jury.

2(B). The trial court's charge to the jury instructing that voluntary manslaughter is a lesser included offense of murder and that the accused should be convicted of voluntary manslaughter if the evidence shows the accused knowingly caused the death of another while under extreme emotional stress is a proper charge under Ohio law and within the parameters of constitutional due process.

Petitioner's assertions 2(B)(C) raise the same issue and will therefore be discussed together.

At the outset, it should be noted that petitioner's counsel did not object to the now complained of instructions at trial. The failure to timely object to a jury instruction constitutes a waiver thereto. Ohio Crim. R. 30; *State v. Long* (1978), 53 Ohio St. 2d 91. Petitioner argues, however, that his counsel's failure to object to the instructions was a result of ineffective assistance of counsel, therefore, this Court should examine the instructions despite the waiver. A review of the court's charge revealed no prejudicial effect amounting to plain error under Ohio Crim. R. 52(B). *State of Ohio v. Walter Wilson* (Cuy. Cty. Ct. App., June 23, 1983), Unreported Case No. 45650, at 11. Thus, this issue has been waived and should be dismissed.

Assuming arguendo that petitioner had properly preserved this claim for appeal, the assertion should still be dismissed. The trial court's instruction to the jury was quite proper under Ohio law and well within the parameters of constitutional due process. The very issue raised

by petitioner here was raised and overruled in *State v. Muscatello*, 57 Ohio App. 2d 231 (1977), *aff'd*, 55 Ohio St. 2d 201 (1978).

In essence, the two issues raised by the petitioner are: 1) that the court's charge on manslaughter was error even though it complied with *Muscatello* and 2) the court erred in its two instructions on considering manslaughter even though the first instruction complied with *Muscatello* and the second instruction also complied with what petitioner would have requested initially.

In petitioner's brief on pages 33-39, he takes exception to the following instructions:

1) That manslaughter was a lesser included offense of (murder);

2) That the criminal culpability involved in manslaughter is knowingly, which is lesser culpability than purposely;

3) That neither the State nor the defendant has the burden of proving extreme emotional distress; and,

4) That extreme emotional stress is not an element of any offense and need not be proven by either the State or the defendant.

The *Muscatello* case clearly refutes the allegation of error on all four points. In regard to the first point, voluntary manslaughter is a lesser included offense of murder, *Muscatello* at 236. The degree of culpability for manslaughter is *knowingly*, *Muscatello* at 236. Finally, emotional stress is not an element of voluntary manslaughter, but is a mitigating circumstance for which the defense bears the burden of producing some evidence. *State v. Muscatello*, at 245.

In regard to the manner in which the jury was instructed to deliberate on the charges of murder and manslaughter, the jury was charged, initially, in a manner consistent with *Muscatello,* and after submitting a jury question which requested "a copy of definition of 'manslaughter' and 'murder' ", the court again read its charge on both murder and manslaughter to the jury.

Petitioner contends that it is improper to charge a jury that, if they unanimously agree that the elements of murder have been proven beyond a reasonable doubt, they must return a verdict of guilty on that charge. The court instructed that if they cannot unanimously agree on murder, then they must go on to consider voluntary manslaughter (R. 342).

This very issue on the identical charge was decided by the Court of Appeals and affirmed by the Ohio Supreme Court in *State v. Muscatello.* In that case, it was held that, "In reality the jury will not consider each offense upon which it has been charged in isolation from the other offenses because it will be aware of the inter-relationship of the offenses to each other. . ." *Muscatello,* at 252. That reasoning is particularly applicable in the case at bar in which the jury correctly reviewed the law on murder and manslaughter on two separate occasions.

The instructions given to the jury complied with Ohio law and the requirements of due process. Petitioner Wilson's attempt to discredit the rationale of *Muscatello* is unconvincing in light of the fact that several cases have declined the opportunity to overrule or limit *Muscatello.*[4]

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4. *See e.g. State v. Durkin,* 66 Ohio St. 2d 158 (1981); *State v. Solomon,* 66 Ohio St. 2d 214 (1981).

There was no error in the instructions regarding the elements of murder or voluntary manslaughter. Petitioner's assertion has neither substantive nor procedural merit.

3. The trial court properly denied the accused's post-trial motion for judgment of acquittal when a reasonable jury can reach different conclusions from the evidence as to whether each material element of a crime has been proven beyond a reasonable doubt.

The denial of petitioner's post-trial motion for judgment of acquittal was proper. In Ohio, it is unrefutable that where the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt, a motion for acquittal shall not be granted. *State v. Bridgeman*, 55 Ohio St. 2d 261 (1978). By ignoring some very critical facts in evidence (such as returning with a .12 gauge shotgun to pump more bullets into an already downed man), petitioner makes this ludicrous claim. The evidence in the case at bar was clearly sufficient to justify the trial court's overruling of petitioner's motion. The unrefutable evidence before the jury was that only the petitioner had fired any firearms; the victim's firearm could not be fired because there were no bullets in the chamber; the petitioner took time to fire and reaim between every shot; and the final pistol shot struck the victim in the buttock as he lay face down on the floor with his feet toward the petitioner. The evidence further established that the petitioner then left the immediate area and returned *minutes later* with a .12 gauge shotgun. At that time, the victim was hiding behind a wooden shelf and the petitioner then fired the fatal shot through the shelf into the victim's face. The victim's gun was found on the floor, unfired and still with no bullets in the chamber.

His face was splintered with the wood of the bookcase he had been hiding behind when he was murdered. Clearly, these facts and the remainder of the record warranted the court in overruling any motion for acquittal due to the grossly disproportionate use of force by the petitioner. They also support the jury's guilty verdict. No error having occurred at the trial level which warrants Supreme Court review, certiorari should be denied.

4. The trial court correctly denied a new trial and an evidentiary hearing based upon unsupported allegations of ineffectiveness of counsel.

Despite the contention of petitioner that the trial judge rejected the request for an *evidentiary hearing* on an allegation on ineffective assistance of counsel, the fact remains that such a request was never made. In the hearing held on July 22, 1982, counsel for petitioner specifically requested a judgment for acquittal pursuant to Criminal Rule 29 and he requested a new trial pursuant to Criminal Rule 33. As grounds for those motions, petitioner had cited ineffective assistance of counsel, but neither Criminal Rule 29 nor Criminal Rule 33(A) is a vehicle for that contention.

Criminal Rule 33(A) provides:

(A) Grounds

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the State;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.

* * * * *

Clearly, petitioner has not touched upon any of these criteria and had no foundation for the type of motions he was requesting. If the record demonstrates the absence of facts that would entitle the accused to relief for ineffective assistance of counsel, the trial court may so find without granting an evidentiary hearing. *State v. Hawkins* (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 41101. *See also, State v. Perry* (1967), 10 Ohio St. 2d 175. Even with that limitation, however, counsel for petitioner was still given the opportunity to proffer into the record the evidence he would have solicited. There was no error in denying the petitioner a new trial or an evidentiary hearing.

Furthermore, the record negates any contention of ineffective assistance of counsel for two reasons. First, the

trial record itself is void of any instance of a substantial breach of duty on the part of the defense lawyer or any prejudice to his client. (See State's response to Assignment I.) Second, petitioner cannot now contend that there would be collateral evidence of ineffective assistance of counsel because counsel for petitioner had the opportunity to put on the record what that evidence would be. That proffer by petitioner merits further attention. On the record, at the conclusion of his proffer, trial counsel stated, ". . . we offered the proffer as to the essence of what Mr. Wilson would testify to, and *I'm satisfied with the posture of the record*" (Supp. R. 13). In his proffer, counsel for petitioner talked almost exclusively about his concern that there was no objection to the charge that the defendant must prove an affirmative defense with a preponderance of evidence. That that issue did not prejudice the petitioner is obvious from *State v. Davis* and *Engle v. Isaac*. (See State's response to Assignment 2.) There was no other allegation of prejudice or breach of duty in the proffer, nor has any been cited in petitioner's petition to this Court than has already been discussed.

Petitioner incorrectly relies on *United States v. DeCoster* (1973), 487 F.2d 1197 to support his contention that he was entitled to an evidentiary hearing on the issue of ineffective assistance. In that case the record raised serious questions about the counsel's litigation skills, and the court remanded the case back to the trial court for a hearing to investigate counsel's effectiveness. In the case before us, the record of the trial as well as the record of the hearing provide sufficient evidence for a conclusion that trial counsel adequately represented petitioner, and petitioner's arguments did not indicate any possibility that information outside the record would demonstrate otherwise. Petitioner's final assignment of error should be overruled.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court. The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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